

**OPINION
60-129**

May 19, 1960 (OPINION)

HIGHWAYS

RE: County Roads - Right-of-Way - Rights In and To Gravel, etc.

Your letter dated May 13, 1960 requesting an opinion from this office relating to rights in and to gravel or other road materials located within thirty-feet of a section line, is herewith acknowledged.

The Supreme Court has consistently held that the interests acquired by the state and the public in the lands within thirty-three feet on either side of congressional section lines, was that of an easement only and the fee has remained in the landowner. See Wallentinson v. Williams County, 101 N.W. 2d. 571 (1960) and cases cited therein.

Your first question concerns the right of Burleigh County to mine the gravel and use the same for road purposes when found in commercial quantities within thirty-three feet of a section line. Although you have indicated that the roadway has never been opened, it appears that in this state all section lines are opened, it appears that in this state all section lines are opened for public travel without any formal proceedings to open or to improve the roadway, unless the statutory procedure to close has been followed.

Generally where the state has only an easement, the state may use the earth, stone, and gravel taken from the right of way for purposes of building or repairing the highway in that immediate area, however the state would have no right to remove such material for use elsewhere unless it is necessary to remove such material in order to bring the roadway to a proper grade and any materials that are so removed may be disposed of at the discretion of the state without accounting to the owner of the fee.

It would therefore appear that Burleigh County may not conduct gravel mining operation in the area described in your letter without it being necessary to do so in order to build or repair a highway thereon.

Your second inquiry concerned the right of the owner of the fee to remove gravel from within thirty-three feet of a section line.

Where the state has only an easement, generally the owner of the fee may remove underlying minerals, however he may only do so in a manner that will not disturb or interfere with the public rights. The easement carries with it such attributes of a fee simple title which are necessary to sustain and protect the public use and enjoyment thereof.

Although the fee to the highway may be in the abutting owner, his ownership of the soil, rock, gravel and other materials within the limits thereof is subject to the rights of the public therein to use so much of the same as may be needed in constructing, improving or repairing the highway.

He may remove such gravel, earth or other materials from within the limits of the right of way where this causes no injury to the public rights and will not render more difficult or burdensome the future improvement or maintenance of the highway and conversely, he has no right to remove such materials where to do so would injure the right of way or would otherwise interfere with the enjoyment of the public right or would render future improvement or maintenance more difficult or burdensome.

It is the opinion of this office that material may not be removed from public right of way by the county without protecting the interests of the fee owner as described above nor by the fee owner without protecting the interest of the public as described above.

LESLIE R. BURGUM
Attorney General